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Paul R. Rice

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Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?

by
PAUL R. RICE*

Introduction

Twenty-seven years ago, codifying the common-law rules of evidence provided numerous immediate benefits. Today, however, we have experienced changes in the realities of litigation (e.g., modern discovery rules and the exigencies resulting from “rocket dockets”), and significant advancements in technology. The critical mass of these developments has and will continue to expose flaws inherent in the current codified system of rules. Indeed, because the quasi-legislative body responsible for the growth and development of the transplanted rules fails to reassess them regularly and comprehensively, the burgeoning problems created by codification can only worsen.

Central to this paper is the notion that replacing the common-law method for developing evidentiary principles on a case-by-case basis requires attention to all developing needs, not just those currently causing serious problems. Like the engine of an automobile, the rules by which the engine of justice is driven cannot continue to run well with just oil changes and minor adjustments. Preventive maintenance

* Mr. Rice is a Professor of Law and Director of the Evidence Project at the American University Washington College of Law. Recently he has authored *BEST KEPT SECRETS OF EVIDENCE LAW: 101 PRINCIPLES, PRACTICES & PITFALLS* (Anderson 2001); *EVIDENCE: COMMON LAW AND THE FEDERAL RULES OF EVIDENCE* (LEXIS 4th ed. 2000); *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* (West Group 2d ed. 1999); and *ATTORNEY-CLIENT PRIVILEGE: STATE LAW* (Rice Publishing 2002). The last two listed publications can be found at <http://www.acprivilege.com>.

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must be practiced. Periodically, every major component must be examined for purposes of overhaul or replacement. Even the design of the machine itself must occasionally be reassessed in light of its overall performance.

Part I of this paper outlines the history of the Advisory Committee on the Federal Rules of Evidence. Part II examines the benefits and drawbacks to the codification of the common-law rules of evidence, especially when viewed in light of the Advisory Committee process to which their maintenance has been delegated. Part III briefly addresses how the Advisory Committee fails to act independently, deferring instead to the Chief Justice's desire to limit the Committee's law reform activities. Part IV offers specific proposals for change.

I. A Brief History of the Advisory Committee

Through the Rules Enabling Act,¹ Congress delegated to the Supreme Court the responsibility for maintaining all procedural codes, including the Federal Rules of Evidence. The Court assigned this responsibility to the Judicial Conference of the United States,² which now has responsibility for maintaining all of the procedural codes Congress has adopted. Within the Judicial Conference, this responsibility has been assigned to the Committee on Practice and Procedure and, in turn, to Advisory Committees for each procedural code.

For the first twenty years after enacting the Federal Rules of Evidence in 1974, a Federal Rules of Evidence Advisory Committee did not exist. Responsibility for maintaining the evidence code was added to those of the Advisory Committees on the Federal Rules of Civil and Criminal Procedure. In those Committees, the Evidence Code received little attention.

Not until 1992, at the urging of many individuals, including Chief Judge Edward Becker of the Third Judicial Circuit and Professor Aviva Orenstein,³ was the Federal Rules of Evidence Advisory

1. 28 U.S.C. §§ 2072-2074.

2. 28 U.S.C. § 331 (establishing judicial conference).

3. See Edward R. Becker and Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 142 F.R.D. 519 (1992), also printed in 60 GEO. WASH. L. REV. 857 (1992) [hereinafter Becker & Orenstein] (identifying a then trend in the Supreme Court decisions "toward a plain meaning" interpretation of the Federal Rules of Evidence, 142 F.R.D. at 526; suggesting that trend might stultify reform in evidence law, noting that Congress lacked "sufficient institutional interest . . . to pursue the job" of remedying problems, *id.* at 572; and, as a result of such factors, asserting that an advisory committee was the best vehicle

Committee established. The Chief Justice of the United States Supreme Court appoints all members of this Committee.⁴

The Advisory Committee proposes revisions to the rules, holds public hearings and reports any approved change to the Rules Committee.⁵ If that Committee approves the change, in whole or in part, the change is reported to the full Judicial Conference. Approval of the full Judicial Conference must be followed by approval from the Supreme Court (a review that, usually, is *pro forma*). From the Supreme Court, the change is sent to Congress. Congress can reject the change (a rare occurrence), explicitly approve it (even more rare), or do nothing (the usual course). Congress' inaction functions as an implicit approval of the change, which then becomes effective in the month of December following the "approval."

This is the process that has been substituted for development of evidentiary principles through judicial decisions under the common law.

II. From Common Law to Codification

The move from the common-law method of developing evidentiary rules on a case-by-case basis to a codified system of rules has had both positive and negative consequences. On the positive side, codification established a uniform code of evidence throughout the federal judicial system, eliminating dependence on the evidence rules of each state in which the federal district courts sit. Codification also provided a model for state adoptions, facilitating consistency in evidence rules both among the states and between the federal and state systems.

On the negative side, the shift from a common law to a codified system has changed the dynamic of the evolution of evidentiary principles. Evidentiary rules are now the product of a quasi-legislative process. No longer do the equities of the unique evidentiary circumstances of particular cases control the development of evidentiary rules.

The Advisory Committee's involvement with the Code has been a serious disappointment in a number of ways. First, the Committee has focused its attention too narrowly, confining itself to a few types of issues, such as those that its members considered the most compelling problems for the courts.⁶ The Committee also focuses on

for promoting the cause of evidence reform because such a committee could engage in "responsible monitoring and selective revision" of the Federal Rules, *id.* at 570).

4. 28 U.S.C. § 331.

5. *Id.*

6. For example, whether FED. R. EVID. 609, impeachment by evidence of prior convictions, is modified by FED. R. EVID. 403.

issues of personal interest to members of the Committee, even if these issues have not caused serious problems for the courts.⁷ Finally, the Committee focuses on issues of concern to members of Congress and special interest groups that make proposals to and advocate before the Committee—influencing decisions in a way that would not have been possible under the common-law case-by-case decisionmaking process because they would have had no standing to participate.⁸

The second drawback to the Advisory Committee's involvement with the code has been the serious delay in addressing outstanding issues. Because the needs of pending cases do not drive rule evaluations, issues can linger, remaining unaddressed by the Advisory Committee for decades.⁹ The members of the Advisory Committee

7. For example, adding to FED. R. EVID. 801(d)(2) the clause that precludes courts from relying exclusively on the contents of the statements under consideration to determine agency for vicarious admissions.

8. For example, the multiple revisions that have been made to Rule 412, addressing the admissibility of past sexual behavior of alleged victims of sexual offenses. These revisions were the result of pressure by women's organizations on both Congress and the Advisory Committee. Fortunately, unlike other revisions to the evidence rules enacted by Congress, the revisions to Rule 412 originated in the Advisory Committee, and therefore, were more carefully drafted than revisions originating outside the process established by the Rules Enabling Act.

9. The following are some examples: (1) If statements are classified as exclusions from the definition of hearsay, FED. R. EVID. 801(d), rather than as exceptions to the hearsay rule, FED. R. EVID. 803, 804, because their admissibility is not based on their inherent reliability, why are Ancient Documents and the new hearsay exception, Forfeiture by Wrongdoing, codified as exceptions in FED. R. EVID. 803, 804(b)(6)? (2) FED. R. EVID. 803(8)(B) completely excludes matters observed by law enforcement personnel from criminal trials (the defendant cannot even offer them against the government), but 803(8)(C) permits findings of fact that are not based on personal knowledge to be used against the government. This inconsistency gives the least reliable statements the greatest admissibility. (3) FED. R. EVID. 602 requires witnesses to testify on the basis of personal knowledge. The only exception delineated in the Rules is testimony by expert witnesses under FED. R. EVID. 703. Despite the omission, vicarious admissions under Rule 801(d)(2) have never required that the agent be shown to have possessed personal knowledge. (4) FED. R. EVID. 704 explicitly precludes only expert witnesses from testifying with respect to the mental state or condition of a defendant. Presumably, therefore, lay witnesses could testify to such matters. However, the last sentence conflicts with the explicit language at the beginning by providing that the issues of mental state or condition "are matters for the trier of fact *alone*." (5) There is no bias rule and the courts have been in conflict over whether a foundation is required. Those requiring a foundation have relied upon FED. R. EVID. 613 for authority, which addresses prior inconsistent statements, but that rule has *eliminated the foundation requirement*. (6) FED. R. EVID. 803(22) permits only judgments of conviction in criminal felony cases to be admitted to prove facts essential to sustain that judgment. The conclusions reached in all civil cases are not admissible under the hearsay exception, but inconsistently Rule 803(8) permits findings from government agency investigations to come into evidence even though the rules of evidence were not followed in the proceedings leading to those findings and the same procedural due process was not afforded all participants. Another

have offered many reasons for failing to address issues. They have argued that these issues are not creating problems serious enough to consume the limited time that the Committee members have to devote to Committee work.¹⁰ Committee members have said that they are concerned that their changes will create more problems than they solve.¹¹ The Chief Justice, meanwhile, has emphasized to Committee chairs that he would like to see minimal revisions—only those changes necessary to resolve the most compelling problems—nothing that could be considered law reform.¹² As a consequence, this

inconsistency is that FED. R. EVID. 801(d)(1)(A) permits the admissions of a party through a guilty plea to come into evidence, but the misdemeanor judgment based on that plea is inadmissible. (7) Expert opinion testimony is admitted at trial solely for the purpose of assisting the jury in arriving at factual conclusions. Nevertheless, FED. R. EVID. 703 permits experts to rely on otherwise inadmissible evidence that the jury may never be permitted to hear. Therefore it is common for experts to testify to conclusions that they would not be willing to reach if they were limited to the evidence that the jury is permitted to hear. For a comprehensive discussion of these and other issues, see P.R. RICE & W. DELKER, *FEDERAL RULES OF EVIDENCE ADVISORY COMMITTEE: A SHORT HISTORY OF TOO LITTLE CONSEQUENCE*, 191 F.R.D. 678 (2000); Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330 (1997), available at wcl.american.edu/pub/journals/evidence.

10. Letter from Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to Paul R. Rice, Professor of Law, American University Washington College of Law (Nov. 14, 1997) (on file with author). This may explain why the split of authority over the scope of FED. R. EVID. 408, *Compromise and Offers to Compromise*, remains unaddressed. Rule 408 states only that compromise offers and accompanying statements are “not admissible” to prove liability for a claim. By contrast, FED. R. EVID. 410, *Inadmissibility of Pleas, Plea Discussions, and Related Statements*, states that such offers and statements made in the context of criminal plea negotiations are “not, in any civil or criminal proceeding, admissible against the defendant.” A small number of courts have been split over whether civil compromise statements in FED. R. EVID. 408 are later admissible in criminal proceedings, since the explicit exclusion from both is missing. Compare *United States v. Skeddle*, 176 F.R.D. 254, 256-57 (N.D. Ohio 1997) (excluding such statements in subsequent criminal proceedings), with *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) and *United States v. Gonzalez*, 748 F.2d 74, 78 (2d Cir. 1984) (holding that Rule 408 does not prohibit the receipt of such evidence in criminal proceedings).

11. See letter from Peter G. McCabe, *supra*, fn. 10. Although the Committee identified several rules that could be clarified or simplified, it decided to engage the rulemaking process only if it was necessary to obviate a ‘real’ problem. In many instances, the Committee concluded that the bar and bench have coped with the minor problems caused by the wording of a particular rule. On balance, such minor problems were insufficient to initiate the rulemaking process, especially when an amendment would generate uncertainty and create litigation regarding its meaning. The inevitable disadvantages in perfecting a rule often outweighed any modest advantages gained in simplifying or clarifying it.

12. Telephone Interviews with Judge Fern Smith and Judge Ralph Winter, former chairs of the Advisory Committee, as well as numerous former members of the Advisory Committee.

attitude toward change has prevailed throughout the Committee's existence.

Committee members have chosen to interpret their legislative mandate as authorizing them only to maintain the code that was adopted in 1974.¹³ The language of the Act, however, does not justify, and certainly does not compel, such a restrictive interpretation. The only evidence rules the Committee is not authorized to create or modify without an explicit act of Congress are those rules relating to privilege.¹⁴

The Chief Justice's attitude is somewhat understandable, when considered in light of the negative impact that followed the significant changes to the discovery rules made by the Advisory Committee on the Rules of Civil Procedure more than a decade ago. *See generally*, Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507 (1993) (Scalia, J., dissenting), Linda S. Mullinex, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

13. Relevant provisions of the Rules Enabling Act provide as follows:

§ 331. Judicial Conference of the United States

The [Judicial] Conference shall . . . carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

28 U.S.C. § 331 (2001)

§ 2073. Rules of procedure and evidence; method of prescribing

(a)(1) The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section. (2) The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.

(b) The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence under subsection (a) of this section. Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.

28 U.S.C. §§ 2073a-2073b (2001).

14. § 2074. Rules of procedure and evidence; submission to Congress; Effective Date

(a) The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then

While the Committee insists it regularly reviews all of the Evidence Rules to determine which, if any, need to be amended, the Committee's self-imposed restrictions have amounted to a shopworn philosophy: "If it ain't broke, don't fix it."¹⁵ This may be an acceptable management philosophy in the day-to-day, or perhaps even year-to-year, operations of the Committee. When, however, "broke" is narrowly interpreted over a period of decades to mean "stopping traffic," too many loose ends of the code remain unaddressed.

Further, Committee members take the position that when deficient rules were enacted outside the process of the Rules Enabling Act, it would offend Congress or exceed the Committee's legislative mandate for the Committee to amend those rules.¹⁶

Meanwhile, Committee members have delayed taking action on rules because they want to see how judges handle the problem.¹⁷ This "wait and see" approach is a bit perverse given our codified system. On the one hand, for the sake of consistency, the codified rules deprive the trial judge of the authority to deal effectively with evidentiary problems. Judges no longer have the right to amend rules by initiating a different practice. Yet, when a codified rule proves inadequate, the Advisory Committee's reluctance to take corrective measures, paradoxically, relies on judges to correct problems in the evidence code. The Committee, therefore, places judges in the ironic position of having to exercise rule-making authority they no longer possess, in an effort to correct problems forced on them by the code that eliminated their authority.

pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

(b) Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.

28 U.S.C. §§ 2074a-2074b (2001).

15. This phrase was voluntarily recited to me by literally every member of the Advisory Committee with whom I spoke in the early 1990's.

16. For example, FED. R. EVID. 704(b), adopted by Congress after President Reagan was shot, which precludes opinions on certain mental states or conditions of a criminal defendant; FED. R. EVID. 413-15, character evidence rules that are directed to specific types of crimes that generally are not prosecuted in federal courts (which the Advisory Committee had previously refused to adopt when they were proposed by Congressional sponsors); Article III, presumption rules that were changed by Congress after the Advisory Committee proposed a different theory; FED.R. EVID. 803(8)(B), the hearsay exception for government records of matters observed by law enforcement officials, into which troublesome language was added during the Congressional debates.

17. See letter from Peter G. McCabe, *supra*, fn. 10.

The "wait and see" approach is arguably necessary in situations where a rule gives broad discretion to trial judges. However, general use of the approach generates the uncertainty and inconsistency that the Evidence Code was enacted to reduce.

As a consequence, the current Advisory Committee, generally, has addressed only minor rule changes—such as inserting a new word or clause into an existing rule. Members informally have discouraged broader proposals, like those in the 350-page Evidence Project Report.¹⁸ At the beginning of the Evidence Project, one Committee member warned that such comprehensive proposals "would not be given serious consideration."¹⁹ A former member confirmed that such proposals likely would be "rejected out of hand."²⁰

A third major problem with the Advisory Committee's involvement with the Code is that, even after observing how trial judges cope with rule problems, the Committee has taken no immediate action.²¹ For a 'wait and see' approach to work effectively, the Evidence Code would need to give explicit authority to trial judges to override or ignore the rules. The language of Rule 102, which states, "[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined" is simply too ambiguous. Judges cannot exercise broad

18. 171 F.R.D. 330 (1997).

19. Telephone conversation with Mr. Gregory Joseph, former member, Federal Rules of Evidence Advisory Committee (May 1996).

20. Telephone conversation with Judge Ralph Winter, former Chairperson, Federal Rules of Evidence Advisory Committee (May 23, 1996). *See also*, the comments of Judge Fern Smith during the panel discussion. She indicated that scholarship, like the Evidence Project Report, would be given more serious attention if it were supported by established organizations. Without such backing, it was given little consideration, as Judge Winter and Mr. Joseph had predicted. The Evidence Project Report was summarily rejected by the Advisory Committee. Before the Report was finalized and formally submitted for consideration, it was officially rejected *in toto* on the basis of drafts that had been sent to the Committee as a courtesy throughout the Project's work on the Report. Letter from Peter G. McCabe, *supra*, note 10. Without notice or opportunity to be heard on any issue, the work of more than forty people over a period of two years had been rejected by the Reporter for the Advisory Committee. This was done without even informing the members of the Committee of the work of the Evidence Project or the existence of the Report.

21. For example, after virtually all courts had applied FED. R. EVID. 407, Remedial Measures, to product liability cases in which "negligence or culpable conduct" (the restrictive language of the rule) had not been proven, the Advisory Committee waited for years to change the language of the rule to conform to accepted practice. After a judicial consensus arose, apparently the Committee concluded that a problem requiring their immediate action no longer existed.

authority with any assurance appellate courts will agree with them.²² The Committee's members are expecting trial judges to exercise more authority than they are willing to exercise.

Of course, if this authority were explicitly given to trial judges, it would undercut the benefits derived from codification—consistency and predictability. The fact that this authority is not specifically granted under the current “wait and see” practice, only serves to make both the code and the “wait and see” approach less effective. Judges unwilling to exercise broad authority are not accurately reflecting their views about the rules through their decisions, and the judges who are willing to pursue just results, despite the language of the rules, are creating the undesirable inconsistencies.

The fourth problem with the Committee is that it has shown a tendency to act like an inferior court to the Supreme Court, rather than as an independent rule-making body. This is probably because judges predominate on the Advisory Committee with the Chief Justice being responsible for the appointment of each member.

When the Supreme Court interprets an evidence rule, its decision does not restrict the Advisory Committee. The Committee can change the Court's result by changing the rule. Rather than reassessing the rule to give more clarity and direction, however, the Committee tends merely to codify the language of the Supreme Court's decision.²³

22. An example of a court needing to assume broad authority to rewrite a defective rule (a rule which, by the way, has never been addressed by the Advisory Committee) is *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975). In *Smith* the court ignored the limiting clause in FED. R. EVID. 803(8)(B), making factual observation of government officials in government records totally inadmissible in criminal cases, and construed it to be the same as the limiting clause in subsection (C), which permits factual findings to be offered against the government.

23. The recent revisions to FED. R. EVID. 702 are an excellent example. Rather than sponsoring a public debate over whether the test announced in *Frye v. United States*, 293 F. 1013 (1923) (requiring general acceptance in the relevant scientific field), or some test other than that announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is the appropriate standard for screening expert opinions on scientific matters, the Committee codified the ambiguous language of *Daubert*—amending the rule to require “testimony . . . sufficiently based upon *reliable* facts,” “testimony [that] is the product of *reliable* principles,” and “methods *reliably* [applied] to the facts.” From the limited knowledge that members of the bar have of the Advisory Committee's work, it appears the Committee gave no serious consideration to rewriting, completely, FED. R. EVID. 702 and 703.

Another example is co-conspirator admissions in FED. R. EVID. 801(d)(2)(E). Prior to the Supreme Court decision in *Bourjaily v. United States*, 483 U.S. 171 (1987), all circuits had concluded that the common-law requirement that the existence of the conspiracy and the defendant's participation in it had to be established with evidence independent of the content of the statement in question. The Supreme Court disagreed, holding that the preliminary decisions could be influenced by the content of the statement in question. While the Advisory Committee did address the question left open in

It is critical that the Advisory Committee become concerned about preparing the Rules for the future rather than simply remedying deficiencies from the past. Since the adoption of the Federal Rules of Evidence, presumptions have been a looming problem because of the limited effect they have been given in Article III.²⁴ More importantly, Article III fails to codify a single common-law presumption. Does this mean that all common-law presumptions have been abolished? This was the Supreme Court's conclusion with regard to the *Frye* "general acceptance" test for determining the admissibility of scientific evidence,²⁵ and the independent evidence requirement for determining the admissibility of co-conspirator admissions.²⁶ Because they were not explicitly adopted when the rule was codified, the common-law restrictions were found to have been abandoned. If, contrary to the above results, the Supreme Court concludes that presumptions have been silently perpetuated, do trial judges continue to have the authority to modify presumptions to accommodate e-commerce issues? Do judges have the power to create new presumptions? This presumption quandary leads to authentication concerns.

Bourjaily, whether the disputed statement alone could satisfy this burden, there is no indication that the Committee seriously considered revising the Rule to, explicitly, adopt the common-law restriction that the Court said had been rejected.

Prior to the creation of the Advisory Committee, its predecessor took such action after the Supreme Court held in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 526 (1989) that FED. R. EVID. 403 did not modify FED. R. EVID. 609. The Civil Procedure Advisory Committee changed Rule 609 to incorporate explicitly that modification.

24. While the rule adopts the "bursting bubble" theory of presumptions, courts have never been satisfied with the limited role this assigns to the presumptions. As a consequence, courts have employed presumptions in very inconsistent ways. In many respects, the practice has been more consistent with the rejected Morgan/McCormick theory of presumptions that shifts the burden of persuasion. See PAUL R. RICE, BEST-KEPT SECRETS OF EVIDENCE LAW: 101 PRINCIPLES, PRACTICES, AND PITFALLS 215-218 (2001).

25. See *Frye v. United States*, 293 F. 1013, 1014 (1923), in which the court promulgated the test for determining the admissibility of novel scientific evidence: "general acceptance in the particular field in which it belongs." Although the standard for determining the admissibility of such evidence was not specifically addressed in the Federal Rules of Evidence, or discussed in the accompanying Advisory Committee's Notes, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the Court held that the standard had been changed. "General acceptance" in the relevant science was no longer a prerequisite to admissibility.

26. Under the co-conspirator admissions rule, it had long been the accepted rule that such statements were not admissible unless evidence, independent of the statement in question, established the existence of the conspiracy and the defendant's participation in it. While perpetuating the common-law co-conspirator admission in Rule 801(d)(2)(E), both the rule and the accompanying Advisory Committee's Notes were silent on the independent evidence requirement. In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Court held the requirement, silently, had been abolished.

With e-commerce, authenticating evidence taken from the Internet is going to be the most pressing issue. This issue is going to be compounded because common circumstantial methods of authentication have been premised on presumptions. For example, a reply letter was accepted as authentic because once it was shown that the original letter was properly addressed, stamped and posted, it was presumed that the letter was delivered to the addressee.²⁷ Authenticity was sufficiently assured when the reply referred to the original letter and was received by the original sender in the due course of the mail.²⁸ Can the same reply doctrine work with e-mail communications? How does an enterprise authenticate an e-mail communication as having been sent by the individual identified in the communication? Self-identification, standing alone, has never been considered adequate.²⁹ If, however, the Internet Service Provider can provide convincing evidence that the communication came from a computer terminal owned or controlled by a particular individual, can courts recognized a presumption that it was sent or authorized by that individual?

Because the evidence rules are no longer evolving on a case-by-case basis, as they did under the common law,³⁰ the legislative or quasi-legislative body responsible for their maintenance must be conscious of its responsibility in this regard. Purposeful evolution of the Code can only result from its regular reassessment and a willingness, on the part of the Committee, to consider more than minor change.³¹

27. McCormick on Evidence § 343 (4th Ed. West 1999).

28. *Id.*

29. *Id.* at § 226.

30. Although judges interpret and apply the rules of evidence on a case-by-case basis, those decisions do not factor into the evolution of the statutory rule until the Advisory Committee decides that a problem needing its attention exists and elects to address that problem. Under the common law, judges did not have the option of ignoring an evidentiary problem until they were prepared to address it.

31. In this regard, it is telling that the one area of evidence law left to development under common-law principles—Article V, Privileges—has continued to evolve in federal courts, while progressive state jurisdictions, like California, restricted by evidence codes have begun to fall behind the curve. The best example of this is the fiduciary duty exception to the attorney-client privilege. This has evolved through federal case law since the adoption of the Federal Rules of Evidence, while the courts of California (where the rules predate the federal rules) no longer have the power to recognize such a doctrine. See, e.g., *Dickerson v. Superior Court*, 185 Cal. Rptr. 97, 100 (1st Dist. 1982):

Citing [*Garner v. Wolfingbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970)], [r]eal parties in interest urge this court to recognize a new nonstatutory exception to the attorney-client privilege. In *Garner*, the United States Court of Appeals held the privilege to be qualified in cases where a corporation was in litigation against its own stockholders. Under the *Garner* rule, availability of the attorney-client

Because Congress has delegated these procedural matters to the Judicial Conference, members of Congress have generally washed their hands of responsibility for maintaining the various Codes. Members of Congress with legal training and some awareness of the intricacies of the Evidence Code, typically are reluctant to involve themselves in rule-making issues because they will reap no political benefit by revising problem rules. Moreover, with the exception of politically charged situations such as the attempted assassination of President Reagan, which resulted in the enactment of Rule 704(b),³² or the cheap attempts to curry favor with voters by passing rules that demonstrate how tough they are on criminals, which produced the Rules 413-15,³³ members of Congress have not sponsored legislation that requires them to have greater knowledge of and involvement in the regular maintenance of the various procedural codes.

This reluctance on the part of members of Congress is probably wise, but it only adds to the need for the Advisory Committee to

privilege to the corporation is "subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." [*Id.* at 1103-04].

The *Garner* court was empowered to create this new exception by rule 501 of the Federal Rules of Evidence (28 U.S.C.) which provides that the rules of privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This rule provides federal courts "'... with the flexibility to develop rules of privilege on a case-by-case basis.'" [*Trammel v. United States*, 445 U.S. 40, 47 (1980).] The courts of this state, however, are not free to create new privileges as a matter of judicial policy and must apply only those which have been created by statute. [citation omitted]. Such an action on the part of the courts is similarly precluded, however, because the area of privilege "is one of the few instances where the Evidence Code precludes the courts from elaborating upon statutory scheme." (Evid. Code, § 911, comment.)

... Specifically, there is no language in the statute which justifies a distinction between corporate clients in suit against their shareholders and other clients in different circumstances. Indeed, corporations are given the same privilege as natural persons. [citation omitted]. Thus although the rule of *Garner v. Wolfenbarger* ... may be a desirable means of preventing abuse of the attorney-client privilege by corporate fiduciaries, this court cannot properly alter the legislative scheme by adopting such a nonstatutory exception. In the absence of an applicable statutory exception to the privilege, respondent court's order compelling answers must be held a violation of the corporation's attorney-client privilege.

See also *Wells Fargo Bank v. Super. Ct.*, 990 P.2d 591, 591 (Cal. 2000).

See generally, PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE: STATE LAW, California § 8:21 (2001). Until the issue of the role of the Advisory Committee has been resolved, and the Committee has demonstrated a willingness to engage in evidence law reform, it would be a mistake to codify privilege rules. Under the Committee's current approach to rule maintenance, it would be a set-back to evolution of principles that has been experienced under the continuing reign of the common law.

32. Excluding expert opinions on certain mental states of criminal defendants.

33. Permitting the introduction of similar sexual conduct evidence.

assume a more active role in maintaining the viability of the Evidence Code. The harsh reality is that, if the Advisory Committee does not actively attend to the future of the evidence rules, no one who has the authority to change the rules will do so.

The Advisory Committee, therefore, has been delegated the responsibility previously borne by the entire judiciary under the common law. If the Committee does not carry its burden, without question this would be the most significant failure in the current codified system of evidence rules.

III. The Structural Problem

Because all members of the Advisory Committee are beholden to the Chief Justice for their appointments, the Chief Justice's desires shape, to a large extent, the activities of the Committee. The Chief Justice has made it clear to new chairpersons that he does not want the Committee to engage in law reform³⁴—he wants minimal revisions, only those changes needed to resolve pressing problems. Because the quasi-legislative process of the Advisory Committee is replacing the diversity of the common-law system, the Chief Justice's influence, either directly or indirectly through his choice of appointees, is too pervasive. Indeed, the control the Chief Justice exerts may well be the primary factor behind the Advisory Committee's failure to act, despite glaring inconsistencies in the current Evidence Code.

IV. Proposals

A. The Advisory Committee's Interpretation of Its Legislative Mandate Must Be More Expansive

It is necessary that the Advisory Committee construe its legislative mandate consistent with the legislative responsibilities that have been delegated to the Committee. Law reform is consistent with maintaining a procedural code when the existing procedures are inadequate, incomplete and inconsistent. The Committee's current narrow interpretation of its legislative mandate seems little more than an excuse to avoid the time commitment, responsibilities, and risks that law reform entails. Perhaps only an amendment to the Rules Enabling Act can change this interpretation.

34. These comments were made in separate telephone conversations between me and two prior chairpersons of the Advisory Committee. Judge Ralph Winter (June 1996); Judge Fern Smith (Oct. 1996).

B. The Advisory Committee Should Adopt a Statement of Intent Regarding the Interpretation of Rules That Have Followed Common-Law Principles Without Explicitly Adopting or Rejecting the Common-Law Restrictions on Those Principles

In a number of instances, rules within the Code have adopted common-law principles without expressly adopting, or even mentioning in the accompanying Advisory Committee's Notes, common-law restrictions that universally accompanied them. Examples include: co-conspirator admissions under Rule 801(d)(2)(E) and the common-law requirement that the existence of the conspiracy and the defendant's participation in it first had to be established by independent evidence;³⁵ prior consistent statements offered to rehabilitate credibility under Rule 801(d)(1)(B) and the common-law requirement that the statement had to be made before the motive to fabricate arose;³⁶ opinions of experts testifying on the basis of novel scientific principles under Rule 702 and the common-law requirement that the scientific principles be "generally accepted" in the relevant scientific field.³⁷ By contrast, when the Advisory Committee wanted to reject the common-law limitations on habit evidence—that there be corroboration and no eyewitnesses—Rule 406 explicitly rejected them with the clause "whether corroborated or not and regardless of the presence of eyewitnesses."

The Supreme Court has employed a "plain meaning" interpretation of the Rules,³⁸ which, in substance has meant "what you see, is what you get" unless the majority's logic compels a different result. We saw this in the Court's *Bourjaily* opinion on co-conspirator admissions and in its *Daubert* opinion addressing the standard for screening scientific evidence. Was this the intent of the drafters? We

35. In *Bourjaily v. United States*, 483 U.S. 171 (1987) the Supreme Court held the restrictions were not brought forward with codification. In light of other rules, it was decided that there was a silent intent to change the common law.

36. In *Tome v. United States*, 513 U.S. 150 (1995), the Court concluded logic dictated that the common-law requirement be brought forward.

37. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Court held all scientific and technological evidence had to be screened for reliability by the presiding judge and that the *Frye* general acceptance test had been abandoned. In substance, the Court held that there had been a silent revolution.

38. See *Bourjaily v. United States*, 483 U.S. 171 (1987) (plain meaning used to interpret Rule 801(d)(2)(E), co-conspirator admission) and *Huddleston v. United States*, 485 U.S. 681 (1988) (plain meaning used to interpret Rule 404(b), prior act evidence). See generally, Becker & Orenstein, *supra* note 3 at 526-30, Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990).

don't know. The general principles announced in Rule 102³⁹ offer no guidance.

C. Membership on the Committee Should Not Be Controlled by a Single Person

The power to appoint should be diversified. Appointments to the Advisory Committee should be made by diverse sources. The fact that the Chief Justice controls all appointments to the Committee has been, perhaps, the most debilitating aspect of the Committee process. His attitude toward the Committee's establishment was negative, and his view of its responsibilities has been narrow and restrictive. This may have influenced who he has chosen to appoint, and the expectations he has voiced to each chairperson.

While the power to appoint Committee members should continue to reside, predominately, within the federal judiciary (since the judiciary is the only organization within the active legal profession that has the knowledge, interest, experience, and credibility to do this work intelligently, and with the least risk of undue influence by special interests), each of the twelve regional circuits should receive one appointment. Such a system would eliminate the undue influence of a single person, while ensuring the interests, experiences and problems of every circuit are voiced.

The chairperson of the Committee should be chosen by the appointed members. The Committee members should control how the Committee functions. Committee members should choose the chairperson from within their ranks. That chairperson should continue to select the Committee's Reporter.

D. Committee Process Should Be More Focused, Transparent and Bar-Sensitive

While the Committee should always be prepared to address pressing problems, each year's agenda should focus on specific Articles in the Code. Once this focus is chosen, it should be announced to the bench and bar, and focused proposals should be solicited. The Committee must seek public input *before* making proposals. Under current practices, public input is generally sought

39. "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expenses and delay, and promotion of growth development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102. This language is so broad it gives no direction. At one extreme the language could be interpreted as leaving trial judges with their common-law powers to do justice. Of course, under such an interpretation, the Rules would be only advisory or suggestive. This, of course, would destroy the consistency that codification attempted to establish.

only after the Committee has decided what revisions it wants to enact. Consequently, the public is placed in a position of having to dissuade the Committee from taking actions its members have already decided are necessary and appropriate. Because, historically, the Committee has rarely changed proposals in response to those comments, such comments could be seen as futile, and therefore, a waste of time.

To facilitate greater participation in the revision process by both the bench and bar, the Committee should take a number of actions. First, in formulating the annual focus of its work, the Committee should be in contact with members of the AALS Evidence Section to discuss problems and developing issues. Second, the Committee should establish an interactive Web page. This would permit the Committee and members of the bar to communicate more conveniently with one another.

Third, when proposals are submitted to the Committee, not only should their receipt be acknowledged, but also initiators should be contacted when their proposals have been rejected by the Reporter, with an explanation beyond the boilerplate letter that is currently employed. The explanation should reveal that the proposal was given serious consideration at some level in the review process.

Fourth, when proposals are brought to the Committee for formal consideration (having passed the Reporter's screen), the initiator should be notified and invited to communicate further with Committee members to explain the merits of the proposal and to comment on any alterations being considered.

Fifth, members of the federal judiciary should be polled on every proposed change. This could be done through accepted sampling techniques. Currently, such surveys are rarely used. Judges are the individuals who previously controlled the evolution of the rules and who still control their interpretation and use. Accordingly, the greatest input should be sought from these individuals. This could be done by e-mail, thereby making responding exceptionally convenient for those judges.

Sixth, at the end of each year, the Reporter should publish on the Committee's Web page a summary of the proposals that have been received or considered and the action taken on each.

Conclusion

Because no Federal Rules of Evidence Advisory Committee existed for 20 years after the adoption of the Evidence Code, and the current Advisory Committee has been unwilling to address deficiencies in the initial Code (as well as ill-advised Congressional revisions thereafter), trial judges have been forced to exercise power equivalent to what they exercised under the common law. But this

power is no longer authorized in our codified system.⁴⁰ Even though judges continue to have power to interpret and resolve conflicts within the rules, they do not have the power to amend bad or inadequate rules, create non-existent rules, resolve conflicts between rules, and ignore language that is inconsistent with the goals of a particular rule. The absence of this power was made apparent in two instances by the Supreme Court. In *Green v. Bock Laundry Machine Co.*⁴¹ and *Bourjaily v. United States*,⁴² respectively, the Court noted that every circuit was in agreement that Rule 403 modified the use of prior convictions under Rule 609 (*Bock Laundry*) and that co-conspirator admissions under Rule 801(d)(2)(E) could be introduced at trial only after the existence of the conspiracy and the defendant's participation in it was established by independent evidence (*Bourjaily*). In both instances, the Supreme Court held that the unanimous interpretations of the evidence rules by the Courts of Appeals did not change the rules. Even with the standard for screening novel scientific evidence, the overwhelming majority of courts agreed that the *Frye* "general acceptance in the relevant science" test continued to apply.⁴³ The Supreme Court, nevertheless, rejected this interpretation in *Daubert*.⁴⁴ Even though the judges have the responsibility for interpreting the rules, their rulings do not cause them to evolve.

Congress has taken from trial judges their common-law power to create and amend the evidence rules that drive their proceedings. It enacted a Code of Evidence and then delegated the responsibility of maintaining that Code to the Judicial Conference of the United States. Because of this delegation, members of Congress have washed their hands of this responsibility—dabbling with the codes on a limited basis when it is politically expedient. They lack sufficient

40. For example, under the common law, judges imposed a requirement of surprise and damage when a party was attempting to impeach his own witness with prior inconsistent statements. Under FED. R. EVID. 607 and 613, a party can impeach his own witness with prior inconsistent statements. These rules impose no requirement that the impeaching party be either surprised or damaged. Courts, nevertheless, have imposed a requirement comparable to "surprise"—"good faith." See, e.g., *United States v. Gomez-Gallardo*, 915 F.2d 553 (9th Cir. 1990), *United States v. Webster*, 734 F.2d 1191 (7th Cir. 1984), *United States v. DeLillo*, 620 F.2d 939 (2nd Cir. 1980), and *Whithurst v. Wright*, 592 F.2d 834, 839-40 (5th Cir. 1979). Do judges have the authority to do this? Can judges also impose the additional requirement of "damage?" Another compelling example is evidence of bias. While general rules of relevance could authorize the admissions of such evidence, how are judges supposed to deal with the foundation requirement that many common-law courts followed? Can they impose such a requirement? Should they? What defines the scope of their authority to structure a new rule?

41. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989).

42. *Bourjaily*, 483 U.S. 171 (1987).

43. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993).

44. *Id.*

knowledge of the Code's intricacies to get involved in meaningful law reform, and because they cannot identify a constituency whose interests are served by such an effort, even if they had the knowledge, they lack the motivation.

The Conference, in turn, delegated this responsibility to its Committee on Rules of Practice and Procedure, which, in turn, delegated it to the Advisory Committee on the Federal Rules of Evidence. This is a Committee the Chief Justice apparently did not want, and had to be pressured to appoint its members after the Conference authorized it over his objections.⁴⁵ Because the Chief Justice appoints all of its members, and has made it clear he wants minimal activity—that is, nothing he would classify as law reform—little has been done to address the many needs of the code that have become apparent over the past thirty years. This inactivity has, in effect, delegated the responsibility for maintaining the evidence rules back to the judges from whom it originally was taken. The only difference is that the judges, who will address evidentiary needs because they have no choice, no longer have the power they previously possessed. They are bound by language they cannot amend. As a consequence, a process has evolved in which no one can or will do anything of any significance.

If the Advisory Committee continues to take a reserved role in the evolution of evidentiary principles, and continues to follow the "wait and see" approach to code maintenance, and if the Judicial Conference of the United States allowed this abdication of responsibility, legislation should be sought from Congress that gives trial judges the express authority to fill the void left by the Advisory Committee's inaction. Of course, in doing so, Congress would formally be creating a common-law system that is legislatively driven, and a legislative structure with a common-law safety valve to accommodate selective inactivity. This would be a formal recognition of the Rube Goldberg contraption under which we currently operate.

Postscript

Seldom do current members of the Federal Rules of Evidence Advisory Committee publicly appear with critics to respond to their concerns. The panel at the Evidence Section of the AALS Conference was no exception. However, all panelists, other than me, had previously served on the Advisory Committee, and Professor

45. "Although the Judicial Conference approved the recommendation [to create a Federal Rules of Evidence Advisory Committee], the Chief Justice, for reasons we do not know, never appointed a Committee." See Becker & Orenstein, *supra* note 3 at 860. Soon after the Becker & Orenstein article was published, the Advisory Committee was established.

Kenneth Broun is currently a consultant to the Committee. Their comments gave everyone a better understanding of the Committee, the attitudes of its personnel and their expectations of those who propose revisions to the Federal Rules of Evidence.

Each panelist had been given my paper before the discussion. In light of their responses to my criticisms of the Advisory Committee process, and comments on other topics, this postscript is my reply. My first comment is on Professor Broun's proposal to codify privilege rules. The remaining comments are addressed to what might be described as attitudes and expectations of members of the Advisory Committee as reflected in the statements of Judge Fern Smith, the former Chairperson of the Advisory Committee, and Gregory Joseph, a former member.

A. Codification of Privilege Rules

All privilege rules in Article V of the Proposed Federal Rules of Evidence were replaced in Congress when it became apparent that controversial privileges would give rise to protracted debates that might jeopardize, or at least significantly delay, the adoption of the entire evidence code. In lieu of specific privilege rules, Rule 501 was adopted.⁴⁶ In substance, this rule leaves the development of all privilege rules to common-law principles, announced on a case-by-case basis.

Under common-law principles, a number of new privileges have been recognized⁴⁷ and established privileges have continued to evolve.⁴⁸ Of course, inconsistencies have been a by-product of this

46. Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. FED. R. EVID. 501.

47. See, e.g., *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990) (clergy-communicant privilege); *Bredice v. Doctor Hosp., Inc.*, 50 F.R.D. 249 (D. D.C. 1970), *aff'd* without opinion, 479 F.2d 920 (1973) (self-critical analysis privilege); *In re Grand Jury Subpoena*, Dtd. Jan. 4, 1984, 750 F.2d 223 (2d Cir. 1984) (scholar's privilege); *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991) (ombudsman privilege); *May v. Collins*, 122 F.R.D. 535 (S.D. Ind. 1988) (journalist/newsgatherer privilege).

48. For example, the attorney-client privilege historically has required communications between an attorney and client be confidential before the privilege protects it. However, courts have shown such a willingness to overlook the loss of confidentiality; it has become a condition precedent to the creation of the privilege but not a necessary condition for its continuation. As some point it may be appropriate to abolish

development. Surprisingly, though, there have been far fewer than one might expect. Professor Broun wants to eliminate these inconsistencies by renewing the old legislative battle to codify them.

Perhaps the Congressional landscape has sufficiently changed to alter the likely outcome of a renewed effort to codify. One factor supporting the attempt is the fact that regardless of how the debate proceeds, and how much time it consumes, it will no longer jeopardize the remainder of the Evidence Code. Nevertheless, I believe that the codification of privilege law is unnecessary and may in fact be counter-productive in areas like the attorney-client privilege.

Professor Broun convincingly identified some advantages of codification—clarity, consistency in application and uniformity within the federal system and among the states when the federal rules are used as a model. Few would deny that these are the *immediate* benefits of bringing privileges back into the codification fold. What Professor Broun does not address in his article,⁴⁹ however, are the *long-term consequences* of codification. As I previously discussed, the Advisory Committee is demonstrably unwilling to address many of the obvious problems and inadequacies that currently exist under the evidence rules; in fact, many of these difficulties have existed since the rules were adopted in 1973. Why should we relegate privilege rules that are currently vital and dynamic to the Committee's relatively stagnated process?

Uniformity is not an end in itself. It is desirable only if it does not sacrifice the long-term benefits—including evolution of the law—that flow from open and continuous debate. Under the current leadership of the Advisory Committee process, I fear that codification will come at the expense of the developments we are currently witnessing. It may translate into little more than trading uniformity for the rich public debate we have experienced under Rule 501.

The quasi-legislative process under which we are currently maintaining the evidence rules has not proven to be more consistent, efficient or fair in the creation and evolution of evidentiary principles than the common law that it replaced. The process is influenced by special interests, involves layer upon layer of bureaucracy and delay, and shows too little concern for the broad interests and needs of the jurisprudence given to its custody and care. Indeed, under the Advisory Committee's 'wait and see' excuse for acting, the Committee is looking for direction to an unofficial common-law system.

the requirement altogether. See Paul. R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853 (1998).

49. 53 HASTINGS L.J. 769 (2002).

As a case in point, during the roughly thirty years that the Federal Rules of Evidence have been in existence, we have seen a vast expansion of principles relating to the attorney-client privilege. For example, a fiduciary duty exception⁵⁰ has been created and widely adopted throughout the federal and state systems.⁵¹ At the same time, the scope of the new exception has been expanded from shareholder derivative actions to virtually any context where a fiduciary duty is owed to the individual seeking access to privileged communications.⁵² Based on the track record of the Federal Rules of Evidence Advisory Committee, it is virtually certain that none of this would have developed through the Committee process. And individual judges, now willing to be creative when given the discretion under Rule 501, probably would not have approved of such changes had their authority to do so been taken away through codification.

During the panel discussion, Judge Smith commented that "Federal judges tend to do what they want regardless of the [Evidence] Rules." After thirty years of working with judges, practicing under judges, and reading literally tens of thousands of court decisions on evidence law, I have found just the opposite to be true. The vast majority of judges, both state and federal, appear to feel obligated to and bound by the literal language of codified evidence rules unless their application will create an obvious injustice. While it is true that Rule 102 of the Federal Rules of Evidence gives broad discretion to judges in interpreting the Rules,⁵³ if, as Judge Smith apparently believes, her colleagues exercise the same authority as they did under the common law, the value of codification would be

50. *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970).

51. See PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES*, §§ 8:17-21 (West Group 2d ed. 1999); PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE: STATE LAW*, §§ 8:17-21 (Rice Publishing 2001).

52. Courts have begun to extend the balancing of interests approach to conflicting interests claims in a variety of fiduciary contexts where the recognition of the privilege would favor the interests of one principal over the other. Examples include a suit by the Secretary of Labor against former officials of a pension fund for their violation of their fiduciary duties; a suit between a limited partner and a general partner in the same general partnership; actions by union members against union officers; an action by trust beneficiaries against the trust and its trustee; an action by excess insurers against the primary insurer; an action by creditors against a bankruptcy creditor's committee; actions by minority shareholders against majority shareholders; an action by a corporation against a former executive who, while employed by the plaintiff, formed a competing corporation, and an action on behalf of a corporation against the law firm that represented the corporation. PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE: STATE LAW*, § 822 at 130-33 (2001).

53. Rule 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

significantly lost. Even if trial judges were willing to exercise authority they no longer possessed, they would risk reversal on appeal. Few judges might want to jeopardize an otherwise valid judgment for the sake of exercising such questionable power in a single evidentiary ruling.

At the state level, a case in point is *Dickerson v. Superior Court*.⁵⁴ California has codified privilege rules. The court in *Dickerson* acknowledged the wisdom of the federal fiduciary duty exception, but refused to adopt it because the California legislature had not recognized it.

The *Garner* court was empowered to create this new exception by rule 501 of the Federal Rules of Evidence (28 U.S.C.) which provides that the rules of privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This rule provides federal courts "[W]ith the flexibility to develop rules of privilege on a case-by-case basis, . . ." (Trammel v. United States, 445 U.S. 40, 47, 100 S. Ct. 906, 911, 60 L. Ed. 2d 186 (1980)). The courts of this state, however, are not free to create new privileges as a matter of judicial policy and must apply only those which have been created by statute. . . . Such an action on the part of the courts is similarly precluded, however, because the area of privilege "is one of the few instances where the Evidence Code precludes the courts from elaborating on the statutory scheme."⁵⁵

Because of the attitudes of those who control the Federal Rules of Evidence Advisory Committee and the Committee's general unwillingness to act on controversial rules, codification will likely repress the types of advancements that we have recently experienced. Indeed, with our instantaneous world-wide communication of judicial decisions, it is no longer apparent that codification, in general, is superior to the development of rules on a case-by-case basis, where only the equities of a rule's application controls its recognition and definition. Law by committee, particularly through the bureaucratized process under the Rules Enabling Act, is inherently less responsive and vital than the common law that we have been experiencing.

Rather than going the route of greater codification, we should be considering changing the evidence rules from a binding code to model rules that only provide guidance. If Judge Smith is correct in her assessment that federal judges currently are not inhibited by the language of the rules, this may be what we informally have now. Of course, under non-binding model rules, the failure of the Advisory

54. 185 Cal. Rptr. 95 (Cal. App. 4th Dist. 1982).

55. Id at 100.

Committee to act would be of little consequence because no one would be obligated to follow them.

B. Process, Attitudes, and Expectations

While appreciating this opportunity to publicly express and debate views with those who were central to the creation and revision of some of our evidence rules, I was particularly troubled by comments from two other panelists. Unfortunately, they were especially revealing regarding past, and perhaps current, expectations and attitudes of the membership of the Advisory Committee. The first comment was by Judge Fern Smith.⁵⁶

Generally referring to articles that I have written criticizing the Committee's actions, and proposing alternative courses, Judge Smith remarked that such scholarship would receive more serious attention if its proposals were supported by organizations like interested sections of the American Bar Association, the Defense Research Institute, and the American Trial Lawyers Association. Apparently defending Professor Capra's summary rejection of the Evidence Project Report (which identified inconsistencies and proposed revisions), Judge Smith suggested that proposals not having such backing can summarily be dismissed because they are facially undeserving, or at least less deserving, of critical examination. While wide support for a proposal may be evidence of its value, the absence of documented support may be due only to the failure to seek public reaction. And even when broad public support is sought but is not forthcoming, this cannot reasonably be construed as reflecting negatively on either the need for or validity of the proposal. Otherwise, the Advisory Committee would regularly have to withdraw most of its proposed revisions: negligible public comment during their notice and comment periods has been the rule rather than the exception.

If membership on the Advisory Committee is based on experience with the Federal Rules of Evidence, an abiding interest in their maintenance, and a willingness to devote the time necessary to complete the work that needs to be accomplished, its membership should be able to assess the validity of a proposal without being told by another organization that it is legitimate. This is particularly true at the initial screening of proposals by the Committee's reporter, because that position has always been filled by an accomplished professor of evidence.

The purpose of the public notice and comment period is to acquire and assess the views of interested organizations. To compel

56. Judge Smith was a former Chairperson of the Federal Rules of Evidence Advisory Committee and currently is the Director of the Federal Judicial Center.

proponents of proposals to come to the Advisory Committee with part of the Committee's work already done, would sacrifice the needs of the evidence code to the bureaucracies, special interests and biases of organizations and their leadership whose goals may not be consistent with the need to maintain the fairness and efficiency of the evidence rules. I dare say the Committee has never imposed that same obligation on proposed revisions that its own reporter, members, or consultants have brought forward.⁵⁷ It is inappropriate to impose a different standard simply because the reporter does not endorse either the proposal or its proponent. To the detriment of the Advisory Committee's work, its process appears to have become one of politics and personalities, where personal interests and biases of individuals hold sway over the interests and needs of the evidence code.

The second troublesome remark was from Mr. Gregory Joseph.⁵⁸ The moderator, Professor Eileen Scallen, had noted a number of controversies that existed around numerous evidence rules and was attempting to expand the discussion by proposing that a solution might be to abandon the evidence code and return to the common law. Before completing her question, Mr. Joseph interjected that the solution would be "to let forty-five second year law students at American University rewrite the rules." His remark was directed to the work of the law students on the Evidence Project, most of whom were third-year students when they participated.⁵⁹ At the earlier

57. One wonders whether Professor Broun be required to have this support before his proposed codification of privilege rules is taken seriously?

58. Mr. Joseph is a practicing attorney in New York and a former member of the Federal Rules of Evidence Advisory Committee.

59. A number of criticisms Mr. Gregory Joseph made of my article were unclear, mischaracterizing my positions. At one point, he appeared to challenge my comments about the unwillingness of Congress to get involved in day to day maintenance of the Evidence Code. His comments, however, curiously seemed to reinforce my point. In addition, the examples of Congressional activities vis-a-vis the Evidence Rules he offered not only demonstrated my point about sporadic congressional actions, and then only in situations where it was politically expedient, but also one of his examples demonstrated the unwillingness of the Advisory Committee to act on critical problems that have plagued the Evidence Code since its adoption.

More specifically, his first attempt to refute my claim was directed at the pressure Congress brought to bear on the Advisory Committee to address the problem of screening scientific evidence. Congress applied this pressure because its members were influenced by special interest groups to promulgate a restrictive rule, not unlike the *Frye* general acceptance in the relevant science test, that would protect corporate defendants, many of whom were substantial contributors to congressional campaigns. Of course, this was the type of special situation to which I referred. And, as Mr. Joseph noted, Congress ultimately delegated the work to the Advisory Committee, which was willing to act only in response to Congressional pressure. If the Evidence Rules had been properly maintained, such problems would have been addressed and resolved long before boiling over into political issues.

stages of the Project when most of the work was accomplished, virtually all were on one of the school's journals, and many were editors. These individuals devoted thousands of hours to the work of the Evidence Project over a period of more than two years. The goal of the Evidence Project was not to "rewrite the rules" and resolve all disputes about their interpretation, but simply to identify and propose revisions to correct inconsistencies within the evidence code. These inconsistencies occur between language and principles within rules, between the rules and practice, and between the Constitution and the roles of participants in the adjudicatory processes in which the rules are employed. Surely, someone with Mr. Joseph's experience must know that third year law students, particularly the most successful with law review training, have the ability to do this work without the practical experience that he has acquired.

Just as proposals should not be summarily rejected because they do not come to the Advisory Committee with organizational backing, they also should not be rejected because of the identity of their authors.⁶⁰ The entire membership of the Advisory Committee should

Next, for reasons that were unclear, Mr. Joseph also mentioned the character evidence rules, Rules 413-15, that Professor Scallen and I had just discussed. Here again, the involvement of Congress was limited, and designed to give the appearance that those who supported the sexual offender rules were tough on the kind of crimes of concern to voters.

The point of Mr. Joseph's next challenge was equally unclear. After I responded to a question by Professor Scallen about the disinterest of congressmen in the evidence code, absent situations in which an identifiable political advantage exists, Mr. Joseph mockingly injected the rhetorical question that Congress "won't get involved when, for example, from your article, the question is whether the ancient document rule ought to be in Rule 803 or 801?" Indeed, Congress would not get involved in such matters, but that was not my point in mentioning the ancient document exception in my article, and Mr. Joseph undoubtedly knew that. My point about that exception was simply that the original Advisory Committee's reason for eliminating admissions from the definition of hearsay—the fact that their use is not premised on their inherent reliability (like most exceptions), but rather is based on the adversarial nature of the litigation process—was not consistently followed. The ancient document exception, for example, is premised on necessity, not reliability, and it remains hearsay. Indeed, I do not believe that either admissions or ancient documents should be eliminated from the definition of hearsay by being moved to Rule 801(d). Mr. Joseph's distortion in this instance is emblematic of the manner in which the Federal Rules of Evidence Advisory Committee has reviewed the work of the Evidence Project—that is, seeking to evade scholarly critique, rather than consider it.

60. In this same vein, Professor Broun remarked during the panel discussion that Congress may not be getting involved with the Evidence Code because the changes the Evidence Project was proposing are based on little more than the fact that "those evidence rules don't teach as well as they otherwise could, that our students have trouble understanding them." Revising rules simply because students don't understand them is certainly an absurd reason for change, but when rules are not understandable because they make little sense, like the assertive/nonassertive distinction in Rule 801(a), and the courts apply the distinction to words as well as conduct (thereby destroying the only justification for making the absurd distinction in the first instance), the rule needs to be changed. The

be thanking these former students, applauding them for their work and commitment, so as to encourage further public service during their careers in practice. Instead, they are being derided, simply to divert attention from the documented inadequacies of the Advisory Committee during Mr. Joseph's tenure.

The attitude expressed by Mr. Joseph was mean-spirited and uninformed. It was particularly alarming and inappropriate for someone of his experience and influence. On the Advisory Committee this kind of exclusionary elitism has produced practices and policies discouraging the broad public participation that its members so often lament. Professor Capra's summary rejection, as the Committee's reporter, of the lengthy Evidence Project Report (1) before it was formally submitted for consideration, (2) without notice that it was being reviewed, (3) without distributing it to the entire membership of the Committee, and (4) without any opportunity for those who had worked on it so diligently to respond to questions or address specific concerns, is evidence that Mr. Joseph's comment reflects an attitude that may be shared within the Advisory Committee.⁶¹ Unchecked, this attitude does not bode well for the Advisory Committee process in the future. Such attitudes hasten the politicization of a rule-making process that is already too heavily controlled by the narrow, restrictive philosophies of Chief Justice Rehnquist.

suggestion that the proposals made by the Evidence Project are premised on such trivial grounds, simply because students manned the project, demonstrates that the Evidence Project's Report may not have been seriously read and considered by anyone on the Advisory Committee.

61. I hope that Professor Capra actually read the Evidence Project Report before it was tossed aside because it contained many of the inconsistencies that he later identified in a report for the Federal Judicial Center entitled "Case Law Divergence from the Federal Rules of Evidence," Federal Judicial Center (2000). If he produces additional reports on inconsistencies it should be a valuable resource.